Testimony Before The United States Sentencing Commission

Public Hearing on
Proposed Amendments to the Federal Sentencing Guidelines
Wednesday, March 13, 2013
Washington, DC

Economic Espionage

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I am pleased to have the chance to testify once again on behalf of the Sentencing Commission's Practitioners Advisory Group. As members of one of the Commission's three standing advisory bodies, we at the PAG appreciate the opportunity to provide the perspective of those in the private sector who represent individuals and organizations investigated and charged under the federal criminal laws.

The Foreign and Economic Espionage Penalty Enhancement Act of 2012, Pub. L. 112-269 (FEEPEA) updates the penalty structure first enacted in the Economic Espionage Act of 1996 (EEA). The EEA addressed two types of trade secret misappropriation, namely, the theft of a trade secret to benefit a foreign government (18 U.S.C. § 1831), and the commercial theft of a trade secret carried out for economic advantage, whether or not the theft is intended to benefit a foreign entity (18 U.S.C. § 1832).

FEEPEA raised the maximum fine from $500,000 to $5 million for individuals. And for organizations, the fine is now either $10 million (the original amount under the EEA) or triple the value of the stolen trade secret, whichever is greater. Notably, Congress decided not to raise the statutory maximum terms of imprisonment (15 years for § 1831 offenses, and 10 years for § 1832 offense).

House Report 112-610, which accompanied FEEPEA, details the complex nature of such offenses, as well as the vulnerability of U.S. business trade secrets and government agency information systems to intrusion by hackers.

Both the House Report, as well as a recent White House Report entitled "Administration Strategy on Mitigating the Theft of U.S. Trade Secrets," available at http://www.whitehouse.gov//sites/default/files/omb/IPEC/admin_strategy_on_mitigating_the_theft_of_u.s._trade_secrets.pdf, discuss the international and organizational nature of trade secret theft, focusing largely on the possible roles of the Chinese and Russian governments in certain of these offenses.

Prosecutions to date have been few in number. In fact, according to the Commission's data file for fiscal year 2011, there was not a single sentencing where 18 U.S.C. § 1831 was the primary count of conviction. The number of such sentencings for 18 U.S.C. § 1832 cases was only 14. On top of that, offenses that *could* be prosecuted under either statute cover an extremely wide range of behavior. Such offenses have the potential for being extremely serious—especially where state-sponsored—but they also have the potential for being minor violations. Or they could land somewhere between those extremes.

The Commission has already encountered a similar situation for offenses subject to §2B1.1. In fact, one reason for the Commission to conduct its comprehensive review of that Guideline is the realization that at least two categories of different offenses have emerged: frauds carrying very high loss amounts (which tend to generate the most media attention) and the mine run of smaller loss cases. The combination of a meager track record for trade secret prosecutions and the potential for high variability in cases that may be prosecuted in the future makes it extremely difficult at this time, if not impossible, for the Commission to capture the behavior properly through specific offense characteristics.

Accordingly, the PAG recommends that the Commission continue to monitor sentences that result from violations of §§ 1831 and 1832. The recent heightened awareness of such offenses, combined with the likelihood of an increase in prosecutions under the Administration's Strategy on Mitigating the Theft of U.S. Trade Secrets, gives ample reason to believe that a richer set of data will soon be available. In addition, the Administration is reviewing the adequacy of current laws with an eye toward presenting new recommendations to Congress in the event its review identifies inadequacies:

> The Administration will continue to ensure that U.S. laws are as effective as possible and that they reflect the seriousness of these crimes and the economic harm inflicted on victims. To supplement the proposals contained in the 2011 White Paper, the IPEC will initiate and coordinate a process, working with appropriate Executive Branch agencies, to review existing Federal laws to determine if legislative changes are needed to enhance enforcement against trade secret theft. The initial review process will conclude within 120 days from the date of the release of this Strategy. The Administration, coordinated through the IPEC, will recommend to Congress any proposed legislative changes resulting from this review process.

Administration's Strategy on Mitigating the Theft of U.S. Trade Secrets, at 11-12.

Presumably this new Administration review, which is not yet complete, will include an assessment of how the current statutes and Guidelines have dealt with, or would deal with, actual cases that the Department has prosecuted or is currently investigating. The Commission, like Congress, should have the benefit of the results of that review before it takes further action.

The PAG therefore firmly believes that the Commission should follow an approach that commends itself to Guidelines amendments as a whole: amend Guidelines for trade secrets offenses only after the track record of prosecutions provides meaningful data.

With the above in mind, the PAG provides the following specific responses to the Commission's request for comment:

(1) *What offenses, if any, other than sections 1831 and 1832 should the Commission consider in responding to the directive? What guidelines, if any, other than §2B1.1 should the Commission consider amending in response to the directive?*

The PAG has not identified other offenses that the Commission needs to consider in response to the directive. If the Commission is going to make amendments in response to this directive, the PAG suggests consideration of Chapter 8. The offenses that carry the greatest threat of economic harm will typically involve companies and other organizations through which materials and products flow. The Commission may wish to solicit comment on whether the commentary to the Guideline provision governing effective compliance and ethics programs should be amended to make special reference to the need for some organizations to have compliance programs that are designed to prevent and detect the threats posed by trade secret theft.

(2) *What should the Commission consider in reviewing the seriousness of the offenses described in the directive, the potential and actual harm caused by these offenses, and the need to provide adequate deterrence against such offenses?*

The value of a trade secret can vary considerably. In a number of instances, it may have little or no commercial worth. Accordingly, in addressing offense seriousness, the Commission should consider whether the theft of a trade secret had any actual and foreseeable financial impact on the victim, or whether the defendant otherwise exploited the trade secret to achieve a tangible commercial advantage.

The Guidelines currently direct the use of intended loss where it is greater than actual loss. The Guidelines also encourage an upward departure where the loss amount—*i.e.*, the higher of actual or intended loss—understates the seriousness of the offense. For many of the trade secrets prosecutions that the Administration lists in its recent publication, the actual or intended loss amounts are substantial, often in the tens or hundreds of millions of dollars. Thus, if anything, the measure of potential and actual harm for these offenses under the current Guidelines can lead to an *over*statement of offense seriousness.

The PAG believes that the Commission should cabin the operation of intended loss when it conducts its comprehensive overhaul of §2B1.1. In the meantime, assessing the pecuniary harm in trade secrets cases will continue to tend toward the speculative due to the challenge in determining the harm that might have resulted had the offense succeeded, not to mention the difficulty in parsing out the degree to which the defendant in fact intended the harm that "might have resulted."

(3) *Do the guidelines appropriately account for the simple misappropriation of a trade secret?*

The PAG believes the guidelines as currently written adequately and appropriately account for the simple misappropriation of a trade secret, especially in those instances where there was little to no exploitation of the trade secret. The PAG suggests the Commission engage in a study of civil cases, especially those involving multinational corporations, where the claims involve trade secret misappropriation. If the Commission were to examine the verdicts in those cases, as well as the methodologies employed to determine the award amounts, the Commission would likely gain better insight into which factors best capture the seriousness of the offense, as well as a richer understanding of which valuation methods would be practical in a criminal sentencing proceeding.

Is the existing enhancement at §2B1.1(b)(5), which provides a 2-levelenhancement "[i]f the offense involved misappropriation of a trade secret and the defendant knew or intended that the offense would benefit a foreign government, foreign instrumentality, or foreign agent," sufficient to address the seriousness of the conduct involved in the offenses described in the directive?

The PAG is unaware of evidence demonstrating that this existing enhancement is inadequate.

(4) *Should the Commission provide one or more additional enhancements to account for (A) the transmission or attempted transmission of a stolen trade secret outside of the United States; and (B) the transmission or attempted transmission of a stolen trade secret outside of the United States that is committed or attempted to be committed for the benefit of a foreign government, foreign instrumentality, or foreign agent?*

The PAG believes that the harm under either of these circumstances can be quite variable. As for the first—transmission or attempted transmission outside the United States—the factor would capture conduct where there was neither an intent nor a reasonable likelihood that the transmission would result in commercial exploitation of the trade secret. Not only does this factor reach very broadly, there are no doubt cases where transmission of a particular trade secret *within* the United States poses a greater economic risk than does transmission outside the country. For example, some owners of trade secrets compete only in the domestic market, and they therefore would face a greater business risk if the misappropriation results in competing products that are made and sold in the United States. For this same reason, an effort to benefit a foreign entity will not necessarily make the offense more serious.

(5) *Should the Commission restructure the existing 2-level enhancement in subsection (b)(5) into a tiered enhancement that directs the court to apply the greatest of the following: (A) an enhancement of 2 levels if the offense involved the simple misappropriation of a trade secret; (B) an enhancement of 4 levels if the defendant transmitted or attempted to transmit the stolen trade secret outside of the United States; and (C) an enhancement of [5][6] levels if the defendant committed economic espionage, i.e., the defendant knew or intended that the offense would benefit a foreign government, foreign instrumentality, or foreign agent?*

This issue for comment well illustrates our reasons for not acting until more information is available. The public interest would be best served if the Commission times its amendments to coincide with the availability of better data on the nature of these violations. As noted above, we simply do not know whether the mine run of offenses meeting the criteria in (C) are really 5 or 6 levels more serious than other fraud offenses. If a 6-level increase is adopted, a defendant with a range of 51 – 63 months will instead be at 97 – 121 months. This would effectively double the sentence for someone who, instead of operating a Ponzi scheme that enriches him at the expense of others, illegally sends to a friend in the government of his home country (for example, a third-world ally of the United States) the technical know-how for improving its emergency response systems.

(6) *Should the Commission provide a minimum offense level of [14][16] if the defendant transmitted or attempted to transmit stolen trade secrets outside of the United States or committed economic espionage?*

The PAG does not believe that the evidence supports this change. For the reasons already expressed, the PAG believes the Commission should conduct further study. Specifically with respect to such a minimum offense level, there is a likelihood of overbroad application given that nearly every instance of economic espionage potentially involves transmission outside of the United States due to the international nature of the Internet and related technologies. And,

as explained above, the harm is not necessarily greater when trade secrets are illegally used abroad rather than domestically.

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As always, I speak both individually and for the PAG as a whole when I say thank you for soliciting and considering our views on opportunities to improve federal sentencing.